No. 77-1517

In the

Supreme Court of the United States

OCTOBER TERM, 1977

JAMES E. GARRISON, President, Board of Education, School District 215; JAMES C. VARNER, Secretary, Board of Education, School District 215; JAMES BURCZYK, Member, Board of Education, School District 215; ROY E. CARRUBBA, SR., Member, Board of Education, School District 215, LARRY T. GIOVINGO, Member, Board of Education, School District 215; WILLIAM D. MORGAN, Member, Board of Education, School District 215; DONALD W. SOBCZAK, Member, Board of Education, School District 215; CHARLES B. WHALEN, Superintendent, School District 215,

Petitioners,

vs.

JULIA GAULT, individually and on behalf of all others similarly situated.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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April, 1978

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AUTHORITIES

CASES:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No.

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vs.

JULIA GAULT, individually and on behalf of all others similarly situated.

PETTTION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this matter on December 20, 1977.

OPINIONS BELOW

The December 20, 1977 opinion of the Court of Appeals, reported at 569 F.2d 993 (7th Cir. 1977), whose judgment is herein sought to be reviewed, is reprinted in the separate Appendix to this Petition, Page 13a. The prior per curiam opinion of the Court of Appeals staying the appeal pending a ruling in *Massachusetts Board of Retirement* v. *Murgia* is reported at 523 F. 2d 205 (1975). (Appendix Page 4a). The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, dismissing the Complaint, is unreported. (Appendix Page 1a).

JURISDICTION

The judgment of the Circuit Court was entered December 20, 1977. On March 10, 1978, Mr. Justice Stevens entered an Order extending the time for filing of this Petition to and including April 24, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED FOR REVIEW

Whether Petitioners' policy requiring retirement of District 215 teachers upon statutory termination of contractual continued service at the end of the school year in which they reach age 65 constitutionally withstands application of the rational basis test.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States Amendment XIV, Section (1):

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of laws."

Illinois Revised Statutes, Chapter 122, Section 24-11, in pertinent part:

"Contractual continued service shall cease at the end of the school term following the 65th birthday of any teacher, and any subsequent employment of such a teacher shall be on an annual basis."

STATEMENT OF THE CASE

This is an action brought pursuant to 42 U.S.C. Sections 1983, and 28 U.S.C. Sections 1343 (3), 1343 (4), 2201 and 2202 seeking injunctive and declaratory relief from Petitioners' policy retiring teachers who reach age 65.

BACKGROUND:

Julia Gault was a 65 year old biology teacher in her last year of contractual continued service at Thornton Fractional Township South High School. Her employer was the Board of Education of High School District 215, the individual members of which were the Petitioners herein, along with the District's Superintendent. By letter of March 7, 1974, the Superintendent informed Julia Gault that the Board of Education was not going to offer her subsequent employment in accordance with Board Policy 4146 which requires that "a teacher who reaches

the age of 65 before the end of a school year shall retire on that date following his 65th birthday".

ILLINOIS STATUTORY PROVISIONS FOR TERMINATION OF CONTRACTUAL CONTINUED SERVICE:

The Illinois School Code provides for the termination of contractual continued service as follows:

"Contractual continued service shall cease at the end of the school term following the 65th birthday of any teacher, and any subsequent employment of such teacher shall be on an annual basis." *Illinois Revised Statutes,* Chapter 122, Section 24-11.

The statutory termination of contractual continued service at the age of 65 coupled with the Board's uniform policy compel retirement of District 215 teachers at age 65.

Section 24-12 of the Illinois School Code setting out extensive procedures to be followed when dismissing or removing a teacher protected by contractual continued service does not apply to denial of subsequent employment to a teacher whose contractual continued service has been terminated by statute. *Illinois Revised Statutes,* Chapter 122, Section 24-12.

RULINGS BELOW:

Prior to receiving any evidence, the District Court issued a memorandum opinion denying Julia Gault's motion for a preliminary injunction and granting the Petitioners' motion to dismiss the Complaint. Holding that the rational basis test applied, the Court determined that the age 65 classification must be accorded a presumption of constitutionality and that it was reasonable

and fair. The Court concluded that Julia Gault could not show the policy of mandatory retirement at age 65 has no rational basis or is otherwise arbitrary or discriminatory. (Appendix Page 3a).

On appeal, the United States Circuit Court of Appeals for the Seventh Circuit initially entered a per curium opinion staying the appeal pending this Court's decision in *Massachusetts Board of Retirement* v. *Murgia,* Appendix Page 4a. Pursuant to the Court's own motion, the parties filed supplemental briefs and on December 20, 1977, the Court of Appeals reversed the District Court's order and remanded this cause for further proceedings. Although affirming the rational basis test as the standard to apply, the Court held that a rational relationship to a legitimate state interest had not been demonstrated.

REASONS FOR GRANTING THE WRIT

Statutes and policies mandating compulsory retirement are widespread, affecting practically the entire national work force. This Court's most recent pronouncement on the subject of mandatory retirement is *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307 (1976), which upheld a Massachusetts statute providing for retirement at age 50 of all uniformed state police officers. The statute was uniformly applied and retirement based solely upon age. The Court also confirmed that rationality, not strict scrutiny, was the applicable statute.

Lindsley v. *National Carbonic Gas Company,* 1911, 220 U.S. 61, is the landmark case with respect to the rules to be applied in an equal protection challenge. The four basic guidelines that have been followed since *Lindsley* are: 1.) That a state legislature has broad discretion to classify in adoption of its police laws, and the equal protection clause will only avoid that which has no reasonable basis and is, therefore, purely arbitrary; 2.) That a classification having a reasonable basis does not offend the equal protection clause merely because it was not mathematically precise or in practice results in some inequality; 3.) That if any set of facts can reasonably be conceived to sustain a challenged statute, those facts will be presumed to have existed when the statute was enacted; and 4.) The one who assails the classification must bear the burden of showing that the classification has no reasonable basis but is essentially arbitrary.

The *Lindsley* guidelines are still viable and have been followed by several jurisdictions upholding uniformly applied compulsory retirement policies based solely on age. *Armstrong* v. *Howell,* 371 F. Supp. 48 (D.C. Neb. 1974); *McIlvaine* v. *Pennsylvania,* 415 U.S. 986 (1974);

East Texas Guidance Center v. *Brochette,* 431 F. Supp. 231 (D.C. Tex. 1977); *U.S.* v. *Neary,* 552 F. 2d 1184 (7th Cir. 1977); *Chamberlain* v. *Wichita Falls Independent School District,* 539 F. 2d 566 (5th Cir. 1976); *Campbell* v. *Aldrich,* 159 Or.·208, App. dismd. 305 U.S. 559 (1938).

Although correct in holding that the rational basis test applies, the action of the Seventh Circuit Court of Appeals in this case cannot be squared with the requirements of *Lindsley.* The District Court correctly held that in order for Julia Gault to prevail on her claim, she must demonstrate that the Board of Education's mandatory retirement policy bears no rational relationship to a legitimate government interest (Appendix Page 2a). The Court went on to articulate reasonable circumstances supporting the classification thereby preserving its presumption of validity. (Appendix Page 3a). In response to the District Court's action, the Court of Appeals summarily disparaged this Court's holding in *Lindsley & McGowan* v. *Maryland,* 366 U.S. 420, by placing the burden on the Board of Education to justify its mandatory retirement policy and by failing to address itself to a reasonable set of circumstances that would justify the policy.

In his dissenting opinion, Judge Pell, in addition to stating that any change in the retirement age should come from the legislative branch, conceived his own reasonable set of facts in deciding that Julia Gault had failed to demonstrate an infringement of her equal protection rights. (Appendix Page 21a).

The controlling opinion, in determining that the Board of Education has not demonstrated the purpose or justification for its mandatory retirement policy, even if the

presumption is to prevent retention of unfit teachers, creates a schism in the law. The Illinois Statute and the policy of the Board of Education are presumed valid. In order to protect this presumption and discourage unwarranted attacks on legislative enactments, this Court enunciated the requirement in *Lindsley*. Not only must the assailer bear the burden of demonstrating a lack of a reasonable basis, any set of facts reasonably conceived to sustain a challenged classification, must be presumed to have existed when it was enacted.

The burden on the assailer is heavy, but not without justification. Any system of laws to be effective must be self preserving for without laws society fails. Laws which are not of benefit to society in general may be culled by challenge pursuant to the holding in *Lindsley*. In order to preserve the integrity of our system of laws, the Seventh Circuit's ruling must not be allowed to stand.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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April, 1978

APPENDIX

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

No. 74 C 931

JULIA GAULT, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

JAMES E. GARRISON, President, Board of Education, School District #215; JAMES C. VARNER, Secretary, Board of Education, School District #215; JAMES BURCZYK, Member, Board of Education, School District #215; ROY E. CARRUBBA, SR., Member, Board of Education, School District #215; LARRY T. GIOVINGO, Member, Board of Education, School District #215; WILLIAM B. MORGAN, Member, Board of Education, School District #215; DONALD W. SOBCZAK, Member, Board of Education, School District #215; CHARLES B. WHALEN, Superintendent, School District #215; each individually and in their official capacities,

Defendants.

MEMORANDUM OPINION AND ORDER

This is a civil action in which the plaintiff, a school teacher, seeks declaratory and injunctive relief against the defendants for alleged violations of her civil rights arising out of a school board policy mandating retirement at age 65. The plaintiff alleges such conduct to be in violation of 42 U.S.C. §1983 and bases jurisdiction in this action on 28 U.S.C. §§1343(3) and (4). Presently before this Court are the plaintiff's motion for a preliminary injunction preventing the defendants from adver-

tising for or hiring a replacement for the plaintiff, and seeking the retention of the plaintiff in her present position. The defendants have moved to strike and dismiss the complaint for lack of subject matter jurisdiction and for failure to state a cause of action.

The plaintiff alleges that the defendants' mandatory retirement policy contravenes her right to due process and equal protection of law. The Fourteenth Amendment does not require an opportunity for a hearing prior to the nonrenewal of a teacher's contract, unless the plaintiff can show that the nonrenewal deprived her of a "liberty" or "property interest" in continued employment. *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Perry* v. *Sinderman*, 408 U.S. 593 (1973). As noted by the Supreme Court in *Perry*:

> ". . . [T]he mere showing that he was not rehired in one particular job, without more did not amount to a showing of a loss of liberty. Nor did it amount to a showing of a loss of property." 508 U.S. at 599.

Furthermore, the Court in *Perry* explicitly rejected the notion that a mere subjective "expectancy" is protected by procedural due process. Therefore, the plaintiff's mere expectancy of employment beyond the retirement age does not entitle her to procedural due process prior to denial of contract renewal.

Additionally, the plaintiff does not establish a denial of her right to equal protection of the law. In order for her to prevail on this claim, she would have to show that mandatory retirement infringes a fundamental right or that age is a suspect classification, or in the alternative, that the mandatory retirement policy bears no rational relationship to a legitimate government interest. The Supreme Court has yet to hold age to be a "suspect" classification.

Since neither a fundamental right or a suspect category is involved, the plaintiff must demonstrate that the classification bears no rational relationship to a legiti-

mate government interest. The age of sixty-five for retirement is a classification which must be accorded a presumption of constitutionality, and an ascertainable rational basis will serve to uphold it. It has long been accepted in our society as an age when most people, because of diminishing mental and physical stamina, are no longer able to endure the rigors of full-time employment. This chronological demarcation has generally proved to be reasonable and fair. It is no less so in the academic world. Teaching not only requires sustained mental acuity, but physical stamina as well. Therefore, it cannot be said that the defendants' policy of requiring mandatory retirement of teachers at age sixty-five has no rational basis or is otherwise arbitrary or discriminatory.

For the foregoing reasons, the plaintiff's motion for a preliminary injunction is denied, and the defendants' motion to dismiss is granted.

ENTER:

/s/ Frank J. McGarr
United States District Judge

Dated: May 22, 1974

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 74-1579

JULIA GAULT, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

JAMES E. GARRISON, President, Board of Education, School District 215; et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 74 C 931

FRANK J. MCGARR, *Judge*.

ARGUED NOVEMBER 11, 1974

Before BARNES, *Senior Circuit Judge*,* SWYGERT and PELL, *Circuit Judges*.

PER CURIAM. The broad issue presented in this appeal is the constitutionality of governmental mandatory retirement requirements.

Plaintiff was a tenured biology teacher at Thornton Fractional Township South High School who was forced to retire at age sixty-five in accordance with the School Board's written policy. The Illinois statutory provisions on tenure provide that the tenure of public school teach-

* The Honorable Stanley N. Barnes of the United States Court of Appeals for the Ninth Circuit is sitting by designation.

ers shall end at sixty-five and any subsequent employment shall be on an annual basis. Plaintiff contends that the Board Policy is unconstitutional on due process grounds (irrebutable presumption and arbitrary termination of public employment) and on equal protection grounds. Plaintiff sought injunctive relief. The district court granted the defendants' motion to dismiss. Plaintiff has appealed.

The Supreme Court has recently summarily disposed of two appeals involving the issue raised in this case. In *McIlvaine* v. *Pennsylvania*, 415 U.S. 986 (1974), the United States Supreme Court dismissed "for want of a substantial federal question" an appeal from a decision of the Pennsylvania Supreme Court[1] rejecting an equal protection attack against a statute mandating retirement at age sixty for Pennsylvania State Policemen. A three-judge federal district court[2] held that it was bound by the Supreme Court's action in *McIlvaine* and dismissed a constitutional challenge by a HUD attorney to the federal law mandating retirement at age seventy. The Supreme Court summarily affirmed. *Weisbrod* v. *Lynn*, 95 Sup. Ct. 1319 (1975). The lower court decision in *Weisbrod* ruled that summary dispositions by the Supreme Court must be treated as decisions on the merits which have the force of binding precedent unless later doctrinal developments indicate otherwise. Moreover, the three-judge court held that *McIlvaine* was not distinguishable either on the ground that it involved an occupation dependent on physical vigor or on the basis that, unlike *Weisbrod*, no explicit due process—impermissible, irrebuttable presumption—claim was presented.

The preliminary issue before us is whether the decision by the *Weisbrod* court concerning the precedential value of Supreme Court summary dispositions is correct. It is

[1] *McIlvaine* v. *Pennsylvania State Police*, 454 Pa. 129, 309 A. 2d 801 (1973).

[2] *Weisbrod* v. *Lynn*, 383 F. Supp. 933 (D. D.C. 1974).

important to determine at the outset the relevance of the fact that we are confronted with two summary dispositions by the Supreme Court, the latter of which is an affirmance of a holding that summary dispositions are binding precedent. This summary affirmance, of course, cannot be conclusive on the very question of whether summary dispositions are binding. Thus, on this precise point it makes little difference that in addition to the dismissal in *McIlvaine* we have the affirmance in *Weisbrod*. But assuming summary dispositions are to be given precedential value, then the affirmance in *Weisbrod* is not merely cumulative. It would be authority for the proposition that a summary disposition concerning a specific mandatory retirement law is apposite to an attack on a law involving a different type of occupation and a different retirement age.

While the theoretical problems associated with interpreting summary dispositions are complicated[3] and the Supreme Court itself, unfortunately, has never fully addressed the issue, there is Seventh Circuit authority squarely on point.

In *Ahern* v. *Murphy*, 457 F.2d 363 (7th Cir. 1972), this court determined that it was bound by a recent Supreme Court dismissal for want of a substantial federal question of an appeal from a Michigan Supreme Court decision holding that an ordinance similar to the one attacked in *Ahern* was not violative of the Equal Protection Clause. In accordance with such authority as Stern & Gressman, *Supreme Court Practice* (4th ed. 1969), this court held that the Supreme Court's disposition was "a decision on the merits of the case appealed." 457 F.2d at 364. Relying on a leading Second Circuit precedent it was decided that a summary disposition must be treated as dispositive precedent rather than merely persuasive:

[3] *See* Note, *Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent*, 52 B.U.L.Rev. 373 (1972).

In a like situation, the Court of Appeals for the Second Circuit held that the Supreme Court dismissal was dispositive. In Port Authority Bondholders Protective Committee v. Port of New York Authority, 387 F.2d 259, 262 (2nd Cir. 1967), the court said:

> "It would be inappropriate for us to make an independent examination of the substantiality of the questions here presented since the Supreme Court has considered them not simply in a similar case but in a substantially identical one.
>
> • • • • • •
>
> "We thus see no escape from the conclusion that the Supreme Court has labeled as unsubstantial the very question which constitutes plaintiffs' most likely basis for asserting federal question jurisdiction."

The *Port Authority* case was questioned in a student law review note, "The Significance of Dismissals 'For Want of a Substantial Federal Question,'" 68 Col.L.Rev. 785 (1968), which seemed to prefer considering the Supreme Court action as persuasive precedent rather than as dispositive. This was the approach of Two Guys From Harrison-Allentown, Inc. v. McGinley, 179 F.Supp. 944 (E.D.Pa. 1959), aff'd 366 U.S. 582, 81 S.Ct. 1135, 6 L. Ed.2d 551 (1961).

Taking cognizance of the law review note, the Second Circuit recently stated that it would "continue to hold our considered position that 'unless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise.'" Heaney v. Allen, 425 F.2d 869, 871 (1970).

We agree with the Second Circuit. The alternative approach would either reach the same result, inasmuch as the Supreme Court's opinion would be extremely persuasive if not dispositive as a matter

> of stare decisis, or would result in endless speculation if, as some writers have suggested, courts attempted to fathom whether the Supreme Court in a particular dismissal for want of a substantial federal question did so because the claim was frivolous or was foreclosed by earlier Supreme Court opinions or was simply passed over as not deserving a large investment of the Court's time. 457 F.2d at 364-65.

Similarly, *Jordan* v. *Weaver*, 472 F.2d 985, 986 (7th Cir. 1973), held that "a summary affirmance is a decision on the merits having precedential value." This court determined that a sovereign immunity argument was foreclosed by Supreme Court summary affirmances.

It might be possible, however, to argue that these Seventh Circuit cases should be reconsidered in light of the Supreme Court's reversal of this court and rejection of prior summary affirmances in *Edelman* v. *Jordan*, 415 U.S. 651 (1974). Indeed, the Supreme Court did explicitly indicate that summary dispositions are not of the same precedential value as fully considered opinions. There the Court said:

> This case, therefore, is the first opportunity the Court has taken to fully explore and treat the Eleventh Amendment aspects of such relief in a written opinion. *Shapiro* v. *Thompson* and these three summary affirmances obviously are of precedential value in support of the contention that the Eleventh Amendment does not bar the relief awarded by the District Court in this case. Equally obviously, they are not of the same precedential value as would be an opinion of this Court treating the question on the merits. Since we deal with a constitutional question, we are less constrained by the principle of *stare decisis* than we are in other areas of the law. Having now had an opportunity to more fully consider the Eleventh Amendment issue after briefing and argument, we disapprove the Eleventh Amendment holdings of those cases to the extent that they

> are inconsistent with our holding today. 415 U.S. at 670-71. (footnote omitted).

From this language it appears that the Supreme Court was indicating that *it* was less restrained in overruling summary affirmances. We do not think, however, that *Edelman* can be read as a direction to lower courts to ignore summary dispositions, although Mr. Chief Justice Burger's concurring opinion in *Fusan* v. *Steinberg*, 95 Sup. Ct. 533, 541 (1975), should be noted:

> Second, although I agree wholeheartedly with the Court's reasoned discussion of the tension between the summary affirmance in *Torres* v. *New York State Dept. of Labor*, 405 U.S. 949 (1972), aff'g 321 F. Supp. 432 (SDNY 1971), and the Court's opinion in *California Human Resources Dept.* v. *Java*, 402 U.S. 121 (1971), Slip Op., at 9-10, n. 15, we might well go beyond that and make explicit what is implicit in some prior holdings. *E.g.*, *Gibson* v. *Berryhill*, 411 U.S. 562, 576 (1971); *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974). When we summarily affirm without opinion the judgment of a three-judge District Court we affirm the judgment but not necessarily the reasoning by which it was reached. An unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument. Indeed, upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established. *E.g.*, *Edelman* v. *Jordan*, *supra*, 415 U.S., at 671; *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 344 (Harlan, J., concurring); 395 U.S. 350 (Black, J., dissenting); *Reynolds* v. *Sims*, 377 U.S. 533, 614 (1964) (Harlan, J., dissenting). (footnote omitted).

This statement also does not indicate that lower courts can ignore such summary dispositions even if they should not be interpreted as overruling prior precedent. The

holdings of the two summary dispositions with which we are concerned do not directly conflict with prior Supreme Court opinions, although Mr. Justice Rehnquist's dissenting opinion in *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632, 659 (1974), argued that "the Court will have to strain valiantly in order to avoid having today's opinion lead to the invalidation of mandatory retirement statutes for governmental employees."

If we were to consider *Weisbrod* and *McIlvaine* as binding precedents, the question which would have to be addressed is whether they are distinguishable from our case. In terms of the major issues presented, we do not think there are any significant distinctions.

One possible basis for distinction involves the particular occupations of the plaintiffs and the ages mandated for retirement. In our case the plaintiff has been required to retire at age sixty-five. In *Weisbrod* the age was seventy and in *McIlvaine,* sixty. There seems little ground on which to argue that although it is constitutional to require retirement at either age sixty or seventy, it is not constitutional to choose the age half way between those two. The argument might be made in a more sophisticated manner, however. In *McIlvaine* the sixty year old age limit was for state policemen, an occupation requiring vigorous physical activity and involving the safety of human lives. The plaintiff in *Weisbrod* was an attorney who was challenging the age seventy requirement. It could be said that whereas these two Supreme Court decisions indicate that mandatory retirement at sixty is proper for employees whose jobs necessitate strenuous physical activity and mandatory retirement at age seventy can be ordered for employees performing nonphysical work, these precedents do not foreclose consideration of whether mandatory retirement at age sixty-five for employees performing nonphysical work is constitutional. A closer analysis of these precedents diminishes the value of this possible distinction. In the first place, the lower court in *Weisbrod* specifically rejected the contention that *McIlvaine* should be distinguished on the basis of the physical ability element. This same argument was raised in the jurisdictional statement presented to the Supreme Court before it summarily affirmed *Weisbrod.* Moreover, since there was no evidence in *Weisbrod* to support the choice of age seventy, we could not hold that that case should be viewed as only upholding legislative determinations as to age seventy and not age sixty-five unless we can take judicial notice of some compelling difference between the two ages. Since we do not think there is any foundation for such judicial notice, we believe these precedents cannot be ignored on the basis of this alleged distinction.

The other area of possible distinction would be differing grounds of constitutional challenge. But the issues raised here are almost identical to those presented in *Weisbrod* in which there was an explicit due process attack premised on the impermissible, irrebuttable presumption line of cases. *E.g., Vlandis* v. *Kline,* 412 U.S. 441 (1973). Admittedly in our case there is also a due process claim grounded on the theory of arbitrary dismissal of governmental employees. While it is not clear that this theory was directly presented in *Weisbrod,* it surely was implicitly considered and denied. (*Weisbrod* supports the position that implicit rejection of arguments can be recognized when interpreting summary dispositions.) In any event, if these mandatory retirement requirements do not constitute an impermissible presumption then dismissal on the basis of such a requirement would not be arbitrary.

Our conclusion must be that if we were to decide this appeal today, we would be constrained to honor the aforementioned Supreme Court summary dispositions as being at least extremely persuasive precedents if not binding ones. Yet we are also aware that the the Supreme Court has seemingly decided to address this general issue fully. Probable jurisdiction has been noted in an

appeal from a three-judge district court decision[4] invalidating a Massachusetts statute mandating the retirement of state police officers at age fifty. *Massachusetts Board of Retirement* v. *Murgia*, 43 U.S.L.W. 3613 (U.S., May 19, 1975) (No. 74-1044). Though apparently constrained by Supreme Court summary dispositions, we do not think that this case should be decided solely on the basis of the two summary decisions referred to, in light of this latest Supreme Court action. Were this a usual case and while it was pending before us the Supreme Court had indicated that it was going to hear argument in a similar case, we might with propriety decide this appeal so as to offer the Supreme Court our views on the question. But in the instant matter we cannot reach the ultimate merits and present our judgment on the issue. Our view on the procedural question is of little consequence because the Supreme Court is of course not bound by these summary dispositions, although the lower courts seem to be in a quandry as to the stare decisis effect of such dispositions. In view of the foregoing we believe the only just course is to stay a final decision on this appeal until the Supreme Court disposes of *Murgia*.

Accordingly, this appeal is hereby stayed pending the Supreme Court's decision in *Massachusetts Board of Retirement* v. *Murgia*. 423 U.S. 816.

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[4] *Murgia* v. *Massachusetts Board of Retirement*, 376 F. Supp. 753 (D. Mass. 1974).

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 74-1579

JULIA GAULT, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

vs.

JAMES E. GARRISON, President, Board of Education, School District 215, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74 C 931—FRANK J. MCGARR, *Judge.*

DECIDED DECEMBER 20, 1977

Before BARNES, *Senior Circuit Judge,*[1] SWYGERT and PELL, *Circuit Judges.*

SWYGERT, *Circuit Judge.* Julia Gault, on behalf of herself and others similarly situated, filed suit under 42 U.S.C. § 1983 challenging the constitutionality of governmental mandatory retirement requirements. Plaintiff contends that defendant school board's policy of forced retirement is unconstitutional as violative of both equal protection (by discriminating against plaintiff on the basis of age) and due process (by creating an irrebuttable presumption and by terminating public employment arbitrarily). Shortly after the complaint was filed, the district court granted defendants' motion to dismiss and plaintiff appealed.[2]

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[1] The Honorable Stanley N. Barnes of the United States Court of Appeals for the Ninth Circuit is sitting by designation.

[2] This case, though filed as a class action, was dismissed before the question of class certification was reached.

After oral argument was heard, this court issued an order staying the appeal pending a ruling in *Massachusetts Board of Retirement* v. *Murgia*, 376 F. Supp. 753 (D. Mass. 1974), *prob. juris. noted*, 421 U.S. 974 (1975). *See* 523 F.2d 205 (7th Cir. 1975). Following the decision in *Murgia*, 427 U.S. 307 (1976), we ordered the parties to file supplemental briefs. We now treat the constitutional issues raised by plaintiff and, for the reasons stated below reverse the order of the district court.

I

Although the facts were stated in our previous opinion, a brief resume may be helpful. Upon reaching the age of 65, plaintiff, a tenured biology teacher at Thornton Fractional Township South High School, located in Cook County, Illinois, was informed by the district school board that she would have to retire at the end of the academic year.

The Illinois School Code of 1961, as amended, Chapter 122 of the Illinois Revised Statutes, does not require the retirement of teachers at any age. It does provide, however, that the tenure of public school teachers shall end at page 65 and that any subsequent employment shall be on an annual basis. Ill. Rev. Stat. ch. 122,, § 24-11. Furthermore, the School Code does not afford teachers over 65 the extensive procedures which a school board must follow to dismiss or remove a teacher.[3] *Id.* at § 24-12.

This statutory scheme is supplemented by defendant school board's policy which states that "a teacher who

[3] This procedure for dismissing or removing a teacher includes a hearing, written notice of charges, a bill of particulars, representation by counsel, cross-examination of witnesses, maintenance of a record of the proceedings, and a decision by majority vote of all members of the board. Ill. Rev. Stat. ch. 122, § 24-12. None of these protections were afforded plaintiff as she was over 65.

reaches the age of sixty-five before the end of a school year shall retire on that date following his 65th birthday . . . ." Policy No. 4146. This policy thereby goes a step further than the School Code and removes all teachers over 65 under the board's jurisdiction from any consideration for this annual retention. It was pursuant to this policy to which plaintiff was terminated.

II

Plaintiff contends that the board policy of compulsory retirement violates her equal protection rights both substantively and procedurally: first, by requiring those over 65 years of age to retire, and second, by denying those over 65 those procedures granted to any other teacher upon termination. We note at the outset that this case does not involve a claim of a right to government employment, but rather concerns only the access to continued eligibility for such employment.

Our first task in assessing an equal protection claim is to determine the proper standard of judicial review. *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 253 (1974). The Supreme Court has employed at least two standards of review: the traditional rational basis test wherein classifications are constitutional if they bear a rational relationship to a permissible state interest, *Dandridge* v. *Williams*, 397 U.S. 471, 485-86 (1970), and the standard of strict judicial scrutiny wherein classifications are constitutional only if they are necessary to promote a compelling state interest. *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). The latter, more rigid, test is applied when reviewing state-created classifications which interfere with the exercise of a fundamental right or involve a suspect classification. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 16-17 (1973).

Which standard to apply in determining whether a compulsory retirement provision denies equal protection was answered in *Massachusetts Board of Retirement* v.

Murgia, 427 U.S. 307 (1976). The Court in that case held that the *right of governmental employment is not fundamental and that age does not constitute a suspect class. Id.* at 313-14. Accordingly, the Supreme Court held the standard of strict scrutiny inappropriate and examined the mandatory retirement statute under the traditional rational basis test. Our inquiry in this case, therefore, is directed to ascertain whether the articulated state interest is legitimate and whether the age 65 classification for the retirement of school teachers is rationally related to furtherance of that state interest.[4]

In Murgia a uniformed state policeman challenged a state statute which forced him to retire at age 50. The Court observed that the purpose identified by the state was a desire "to protect the public by assuring physical preparedness of its uniformed police." 427 U.S. at 314. The record included testimony presented to the trial court pertaining to the rigors and demands of uniformed police activities as well as medical testimony concerning the relationship of age to the ability to perform those functions. Based upon this evidence, the Court concluded that a clear rational relationship existed between the classification and its articulated purpose. *Id.* at 315.

In following the Supreme Court's analysis, we look first for an identifiable state purpose in the statutory termination of tenure and the local board's mandatory retirement of schoolteachers at age 65. Because this case was dismissed shortly after the complaint was filed, no evidence has been presented and no affidavits have been

[4] Plaintiff urges this court to apply an intermediate or third equal protection test, wherein the challenged law must bear a "substantial relation" to the purpose it seeks to accomplish. The Supreme Court seems to have used such a test in the areas of discrimination based on sex and illegitimacy. *See, e.g., Trimble* v. *Gordon,* 430 U.S. 762 (1977); *Craig* v. *Boren,* 429 U.S. 190 (1976); *Matthews* v. *Lucas,* 427 U.S. 495 (1976); *Reed* v. *Reed,* 404 U.S. 71 (1971). We are compelled to decline plaintiff's invitation as *Murgia* is clearly dispositive in this regard.

filed; the court did permit plaintiff to file an "offer of proof."[5] The defendants have not identified the purpose of the requirements in question; their briefs only hint that the purpose may be to remove unfit teachers. In *Murgia,* the Court called upon "the purpose identified by the State" as that to which the age classification must bear a rational relationship. Without such a purpose demonstrated in the instant case, we cannot, absent further proceedings, justify the challenged provisions.

Even if we could assume that the purpose of these provisions is to prevent the retention of unfit teachers, the requirements must fall. Again, unlike the situation in *Murgia,* there has been no evidence presented to indicate any relationship between the attainment of the age of 65 and a schoolteacher's fitness to teach. The physical demands of teaching do not even begin to approach those found by the Supreme Court, upon credible evidence, to be critical to the performance of uniformed state police duties. No evidentiary proof is necessary to note that teaching is a profession in which mental skills are vastly more important than physical ability. We cannot assume that a teacher's mental facilities diminish at age 65. On the contrary, as suggested by plaintiff's offer of proof, much in the way of knowledge and experience, so helpful to the educational profession, is often gained through years of practice.

Another distinction must be drawn between this case and *Murgia.* Because of the nature of the duties re-

[5] A hearing on defendants' motion to dismiss was set for May 17, 1974. On May 16, however, the district court advised plaintiff's attorney not to bring to the courtroom the witnesses scheduled to testify on her behalf. The next day, the district court announced from the bench its ruling granting the motion to dismiss. Following this announcement, the court granted leave to plaintiff to submit an offer of proof summarizing the evidence which would have been presented had the hearing gone forward. On May 22 the district court issued its memorandum opinion and order.

quired of the policemen in the latter case and the imminent possibility of unfitness shown to be related to advancing age, failure to perform properly in any given instance could become a matter of life or death. In contrast, if a teacher becomes unfit, whether because of age or other factors, it does not become a matter of such immediacy that there is not time or opportunity to take appropriate procedural steps for his or her removal. By using the procedures normally taken for the removal of a teacher alleged to be unfit, there is greater guarantee that unfit teachers will be removed while the rest will be able to continue performing their jobs, putting to use the experience and knowledge gained over the years.

It is no answer to say that a state "does not violate the Equal Protection Clause merely because the classifications made by its law are imperfect," *Dandridge* v. *Williams*, 397 U.S. 471, 478 (1970), when these classifications cannot be shown to be even rationally related to the objective the state is attempting to achieve (still assuming *arguendo* such an objective can be shown by the defendants). In *Murgia*, the Court found no indication that the mandatory retirement provision had "the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion wholly unrelated to the objective of the statute." 427 U.S. at 316. Unlike the Court in *Murgia*, we cannot say that the provisions in the instant case would eliminate any more unfit teachers (assuming again that such is the purpose) than a provision to fire all teachers whose hair turns gray.

The decision in *Murgia* was based upon an evidentiary record showing the state's purpose and how the challenged legislation related to that purpose. Here, there is no record. We cannot uphold as constitutionally valid a classification of public schoolteachers based upon age without a showing that it rationally furthers some identifiable and articulate state purpose.

III

Plaintiff's equal protection claim has yet another aspect. She contends that the lack of any procedure in both the automatic termination of her tenure and her mandatory retirement resulted in treatment unequal to that given to any other teacher who is released. Both tenured and probationary teachers under age 65 are guaranteed procedural safeguards prior to any termination. This situation is similar to that in a recent case decided by this court. In *Miller* v. *Carter*, 547 F.2d 1314 (7th Cir.), *cert. granted*, 45 U.S.L.W. 3690 (April 18, 1977), we sustained a constitutional challenge to a City of Chicago ordinance which barred persons convicted of certain crimes from obtaining a public chauffeur's license. The ordinance further provided that a person to whom a license had been issued might have his license revoked after conviction of such an offense; however, revocation was not automatic but was subject to administrative discretion. Thus the ordinance created two classes receiving unequal treatment, the distinguishing fact being whether a person was in possession of the license at the time of his conviction, although the members of both classes were similarly situated in that the type of crime was identical. We found this to be an irrational distinction and held it violative of equal protection.

Here, as in *Miller*, the classification of teachers between those who are afforded and those who are not afforded procedural safeguards before their removal on its face discriminates against persons who are similarly situated. Accordingly, we cannot sanction the total lack of procedural equality suffered by teachers who have reached the age of 65 without a record showing the presence or absence of a justifiable and rational state purpose.

Because plaintiff's complaint states a claim that her rights under the Fourteenth Amendment have been violated, the order dismissing the complaint is reversed and the cause is remanded for further proceedings consistent with this opinion.

BARNES, *Senior Circuit Judge,* concurring

Strict scrutiny is not the proper test for determining whether a mandatory retirement provision denies appellee equal protection, because strict scrutiny of a legislative classification is required only when the classification impermissibly interferes with the exercise of a fundamental right (cases cited in *Murgia,* Note 3), or operates to the peculiar disadvantage of a suspect class (cases cited in *Murgia,* Note 4). If mandatory retirement for a fireman at age 50 does not interfere with the exercise of his fundamental right neither will mandatory retirement interfere with the desire or right of a teacher to teach at age 65. Nor is a teacher within a suspect class. Appellant here has no fundamental right to teach, either at 65, or at any other age, Cf. *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 16 (1973). Here we must examine the state's classification under the less strict rational-basis standard. To paraphrase *Murgia,* "Since physical ability generally declines with age, mandatory retirement at 65 serves to remove from teaching those whose fitness for work presumptively has diminished with age. This clearly is rationally related to the state's objective."

Whether 65 or 60 or 70 is a proper age for teacher retirement is not here our concern. Imperfect classifications made by legislative bodies are not rendered unlawful by their imperfections. *Dandridge* v. *Williams,* 397 U.S. at 485, cited in *Murgia,* p. 316-17.

But to apply these principles to the facts of this case is impossible, because no evidence has been presented at any time (as Judge Swygert's opinion points out), and we have no factual basis upon which to judge the issues or to apply the law.

I concur in Judge Swygert's opinion.

PELL, *Circuit Judge,* dissenting.

The majority opinion draws distinctions found to be persuasively supporting the result reached in the opinion between the present case and *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307 (1976); however, a fundamental distinction between the two cases appears to be ignored. Because it is a significant distinction in my mind, and for other reasons set out herein, I respectfully dissent.

Murgia drew the line for compulsory retirement at the age of 50, "a certain age in middle life," *id.* at 313. While for personal reasons, as well as documented studies, I would be hesitant to say that the person who has reached 65 years of age is necessarily elderly either physically or mentally, I also think as a matter of law that that age was so well established at the pertinent time as a point at which retirement age was reached that if it is to be changed, the change should be accomplished by the legislative branch and not by judicial action purportedly under the Constitution.

In 1967, the Congress, being aware that approximately half of the states had enacted age discrimination legistion, 1967 U.S. Code Cong. & Admin. News 2215, enacted P.L. 30-302, sometimes referred to as the Age Discrimination in Employment Act of 1967. In House Report No. 805 on the pending legislation it was stated that "the bill outlines a national policy against discrimination in employment on account of age, provides a vehicle for enforcement of the policy, and establishes broad general guidelines for its implementation." 1967 U.S. Code Cong. & Admin. News 2220. That national policy insofar as age limitations were concerned was stated to be "individuals who are at least forty years of age but less than sixty-five years of age." 29 U.S.C. § 631. In the statute itself the Congress stated that the Act's purpose was, *inter alia,* "to promote employment of older persons based on their ability rather than age"; and "to prohibit arbitrary age discrimination in employ-

ment . . ." 29 U.S.C. § 621(b). It appears plain that the Congress by so stating the policy did not regard discontinuance of employment beyond the age of 65 to be age discrimination of an arbitrary nature. Indeed, House Report No. 805 indicates that the major concern was not with the 65 year age standard but with the lower limit, which had been lowered from 45 in the original bill, with argument being considered that in some occupations age discrimination could be found at a lower point. *Id.* at 2219.

That a legislative enactment establishes national guidelines does not, of course, necessarily import constitutionality into those guidelines. Nevertheless, when those guidelines are an interwoven part of a broader pattern, as is obviously the situation in this country, of pension and retirement plans and social security statutes, the courts, it appears to me, should be extremely reluctant to tamper with one part of the broad social scheme.

The Supreme Court has told us in *Murgia*, dealing with compulsory retirement of state police officers at the age of 50, that such action by a legislature is presumed to be valid, and that the judicial inquiry must employ a relatively relaxed rational-basis standard reflecting judicial "awareness that the drawing of lines that create distinctions is peculiarly a legislative task." 427 U.S. at 314. This approach to a "middle life" compulsory retirement age directed at one specific occupation suggests that our examination of a compulsory retirement procedure involving a significantly higher age maximum not only applicable to the particular occupation but one generally applicable, and generally deemed appropriate, should be on an *a fortiori* basis insofar as the relativity of the relaxed rational-basis standard is concerned.

The significance of a higher age equation with the propriety of mandatory retirement was implicitly recognized in the *Murgia* district court opinion by the following observation of Judge Aldrich:

> [W]e would anticipate the question of mandatory retirement at age 70 not to be the same as at age 50, but perhaps we say this because of the increasing difficulties that a plaintiff might have to show that at that greater age the state had not made out a factually rational argument.

Murgia v. *Commonwealth of Massachusetts Board of Retirement*, 376 F. Supp. 753, 756 n.9 (D. Mass. 1974).

In any event, just as the courts should dispose of cases if possible on grounds other than by reaching constitutional issues, the courts should also, it seems to me, where the federal legislative picture demonstrates an alertness to and an orderly resolution of a complex societal problem, exercise restraint in intervening under the constitutional cloak in the developmental process on what could only be a piecemeal basis.

In the present context, Congressional concern and continuing interest is clear. In the original Act, the Secretary of Labor was charged with undertaking an education and research program and was specifically directed to recommend to Congress any measures he deemed desirable to change the lower or upper age limits. 29 U.S.C. § 622. While employers were not prevented by the Act from taking action otherwise prohibited where age is a bona fide occupational qualification reasonably necessary to the operation of a particular business, or where differentiation is based on reasonable factors other than age, or where there is observance of the terms of seniority systems or pension and similar plans which are not subterfuges to evade the purposes of the Act, or where there is discharge for good cause, § 623(f), the Act makes age itself within the Act's limits an unlawful basis for discrimination. § 623(a). In the 1974 amendments, it was provided that the definition of an employer included "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State". 29 U.S.C. § 630(b).

Currently, we find that the legislative process is an unintermitted one. Both the House and Senate have passed amendatory versions which are now in conference committee, the conferees having been appointed late in October of 1977. It, *inter alia*, has been agreed by both houses that the maximum age limit shall be 70 rather than 65. *See* CCH Lab. L. Rep., Employment Practices, Rep. 30, October 20, 1977.

The comprehensive legislative scheme as it continues to develop will not, of course, mean, as it does not now, that every employee in every occupation is automatically entitled to stay on to the maximum age limitation. This, obviously, is on the assumption that legislation in the future will continue to recognize § 623(f) factors permitting under-maximum-age employment termination such as good cause discharge, necessary occupational qualification, and bona fide, non-subterfuge employee benefit plans. The maximum age, however, as it is established from time to time in the public interest appears to me in and of itself to import rationality and to preclude challenge by those exceeding the maximum.

Turning to the particular case before us it is noted that the Illinois Age Discrimination Act, as contrasted to the federal statute and most state statutes, does not on its face specify a maximum age. *Kennedy* v. *Community School District No. 7, Champaign County*, 23 Ill. App.3d 382, 319 N.E.2d 243, 246-47 (1974). The court in *Kennedy*, however, rejected a challenge to age 65 retirement by a teacher not only on due process and equal protection grounds but also under the Illinois Age Discrimination Act pointing out that under that legislation, similarly to the federal act, it was not intended to interfere with the operation of non-subterfuge annuity and pension plans, "The long existence of the statutory system of annuities and pensions and its general application to teachers throughout the State demonstrate that the 'retirement system' is not a subterfuge to evade the Age Discrimination Act." 319 N.E.2d at 247.

In the case before us, there is not only the rational relationship between the plaintiff's employment status and a non-subterfuge employee benefit plan but also she had gone beyond the maximum age so specified as a matter of national policy at the time of her termination, even though at the time state employees were not included within the federal statutory coverage.

Further, under the relaxed *Murgia* standard which would be applicable to a person past 65, it appears to me, although it was not expressly articulated by the defense, that the age 65 classification, aside from any aspect of declining physical or mental vigor, rationally furthers an educational purpose of the state. It is common knowledge that there is a growing surplus of teachers with the forecast that this surplus will continue to grow in size with many recent graduates majoring in education being unable to find employment. With the lifting of compulsory retirement and the continuing in employment of teachers who otherwise would have retired, it is reasonably foreseeable that those pursuing higher education will turn to other lines of endeavor with the result that when sheer physical or mental disability, or death, thins the ranks there will not be quantitative, and possibly qualitative, replacements.

I would hold therefore that the plaintiff has failed to demonstrate an infringement of her constitutional equal protection rights. She also has raised on this appeal a claim of due process violation, both procedural and substantive. I discern no merit in this attack. *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564 (1972); *Perry* v. *Sinderman*, 408 U.S. 593 (1972); *Weinberger* v. *Salfi*, 422 U.S. 749 (1975).